

*In the Matter of Mark Competello*

Docket No. 2005-4228

**(Merit System Board, decided January 25, 2006)**

Mark Competello challenges the appointments of five eligibles from the December 16, 2004 certification of the Police Captain (PM3536B), City of Hoboken, eligible list.

The Police Captain (PM3536B), City of Hoboken, eligible list was promulgated on March 1, 2001, containing the names of 13 eligibles. Prior to its original expiration date of February 28, 2004, the eligibles ranked first through seventh were appointed. On January 28, 2004, the Merit System Board approved the extension of this eligible list for one year or until the availability of a new eligible list, whichever occurred first, and it ordered the inclusion of the City of Hoboken (City) in the next testing cycle for the title of Police Captain.<sup>1</sup> See *In the Matter of Police Captain (PM3536B), City of Hoboken* (MSB, decided January 28, 2004).

By letter dated October 18, 2004, the City requested a certification containing the names of three eligibles from the PM3536B eligible list. The resultant October 26, 2004 certification (PL041825) was subsequently cancelled upon the City's December 3, 2004 request that additional names be certified. In the City's December 3, 2004 letter to the Department of Personnel (DOP), it indicates that "[d]ue to expected additional vacancies that the existing certification cannot accommodate, we are requesting that a new [c]ertification be issued for the title of Police Captain listing six names." In response, the DOP issued Certification Number PL042162 to the appointing authority on December 16, 2004 with a disposition due date of March 16, 2005. This certification contained the names of the following eligibles for Police Captain, who appeared on the PM3536B eligible list: James Fitzsimmons (ranked eighth), Kenneth McGurk (ranked ninth), Anthony Romano, Jr. (ranked 10<sup>th</sup>), Dennis Edgar (ranked 11<sup>th</sup>), Edward Mecka (ranked 12<sup>th</sup>), and Fred Ferrante (ranked 13<sup>th</sup>). At the time of the issuance of this certification, the City was authorized by ordinance to employ eight individuals in the title of Police Captain: John Carrier, Edward Cunning, Karen Di Monde, Anthony Falco, Edelmiro Garcia, Jr., Robert Lisa, Daniel Simone, Jr., and James Tuminardo.

By letter dated March 10, 2005, David Roberts, Mayor of the City, requested that the disposition due date of Certification Number PL042162 be extended. Mayor Roberts indicated:

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<sup>1</sup> The appellant, who was not eligible to file for the Police Captain (PM3536B) examination, objected to the City's request to extend the eligible list. His objections were addressed in the Board's January 28, 2004 decision.

It is my intention to make several promotions from the existing certification for Police Captain that is due to expire on Wednesday, March 16, 2005. However, the City of Hoboken, for a variety of reasons due to budgetary constraints has not been able to successfully adopt a budget. I am hopeful that this will be corrected in the near future.

The Department of Personnel granted this request and extended the disposition due date for this certification to April 6, 2005.

Certification Number PL042162 was returned to the Department of Personnel on April 13, 2005. The City indicated its intention to make the following appointments from the certification. Due to the retirement of Tuminardo, effective, January 1, 2005, the City appointed Fitzsimmons, effective January 13, 2005. McGurk and Romano were appointed, effective March 10, 2005. On April 5, 2005, Carrier, Cunning and Garcia were promoted to the title of Police Inspector, pending a classification review of these positions,<sup>2</sup> and Edgar, Mecka, and Ferrante were appointed from the subject certification to replace Carrier, Cunning and Garcia, effective April 5, 2005. These appointments have been conditionally approved by the DOP, pending the outcome of the instant appeal. Accordingly, as of the April 13, 2005 disposition date, the City employed 10 Police Captains and three Police Inspectors.

The Police Captain (PM3549F) promotional examination was announced on July 1, 2004 with a closing date of July 21, 2004. The written and oral portions of this examination were administered on October 21, 2004 and December 4, 2004, respectively. An eligible list containing the names of five eligibles was promulgated on April 14, 2005. Of the individuals on Certification Number PL042162, only one, Romano, appears on the current eligible list. The appellant appears as the first ranked non-veteran on this eligible list. To date, no certifications of this eligible list have been issued.

On August 17, 2005, the City amended its ordinance relating to the organization of its Police Department. The amendment added the rank of Police Inspector to the Police Department's organizational structure and authorized the employment of up to three individuals in this title. In addition, the amendment increased the number of Police Captains to be employed from eight to ten.

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<sup>2</sup> The positions occupied by Carrier, Cunning and Garcia were reviewed by the Division of Human Resource Management (HRM). In its October 18, 2005 determinations, HRM concluded that the positions of Carrier, Cunning and Garcia were improperly classified as Police Inspectors. Thus, HRM determined that these three employees "are considered to be presently and properly classified in the title of Police Captain." The City's appeal of HRM's October 18, 2005 determination is presently pending before the Commissioner of the Department of Personnel.

In the instant matter, the appellant challenges the last five appointments made from the PM3536B list, McGurk, Romano, Edgar, Mecka, and Ferrante.<sup>3</sup> The appellant argues that *N.J.S.A.* 40A:14-118 requires a municipality to establish its Police Department and the organization thereof by ordinance. He notes that *Reuter v. Borough of Fort Lee*, 167 *N.J.* 38, 43 (2001), precludes the appointment of municipal police personnel to positions not created by ordinance in accordance with *N.J.S.A.* 40A:14-118. The appellant maintains that prior to the appointments of McGurk and Romano on March 10, 2005, the City's ordinance provided for the employment of eight Police Captains. As of March 10, 2005, he asserts that the City employed the maximum eight Police Captains, thereby invalidating these appointments. Similarly, with the appointments of Edgar, Mecka, and Ferrante on April 5, 2005 to fill the positions vacated by Carrier, Cuning and Garcia, he emphasizes that the City employed 10 Police Captains, in excess of the eight positions recognized by ordinance. The appellant argues that these five appointments must be declared void in accordance with the *Reuter* decision.

Further, the appellant maintains that the subject appointments violated the Department of Personnel's own policy, as announced in *In the Matter of William J. Brennan* (MSB, decided April 9, 2003), *aff'd*, *William J. Brennan v. New Jersey Department of Personnel*, Docket No. A-4412-02T5 (App. Div. Feb. 24, 2005) (*Brennan I*). The appellant relies on the Board's statements that:

[A]s a general rule a request for extension of a certification disposition due date beyond the expiration date of a list, whether for promotional or open competitive opportunities, be granted only to fill *current* vacancies.

He asserts that the City and the DOP violated this policy in the instant matter. Specifically, in its December 3, 2004 request for a certification of the PM3536B eligible list, the City specifically cited "expected" vacancies as the justification for the issuance of a certification. The appellant avers that the DOP's issuance of a certification for such anticipated and unspecified vacancies is violative of the *Brennan I* doctrine. Moreover, the appellant argues that the DOP's extension of the request to extend the disposition due date of this certification until April 6, 2005, well after the February 28, 2005 date of expiration of the eligible list, did not conform to its own policy. In this regard, the appellant stresses that there were no genuine vacancies in the Police Captain title at the time of the City's March 10, 2005 request to extend the disposition due date. On the contrary, the appellant emphasizes that the City already employed 10 Police Captains, in excess of the number authorized by ordinance. He maintains that the promotions of Carrier,

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<sup>3</sup> The appellant does not take issue with the first appointment of Fitzsimmons; he concedes that Tuminardo's January 1, 2005 retirement created a genuine vacancy that could be filled from the PM3536B list.

Cunning, and Garcia to the title of Police Inspector, which purportedly created the vacancies filled by Edgar, Mecka and Ferrante, were not effectuated until April 5, 2005. He underscores that this date fell after both the February 28, 2005 expiration date of the eligible list and the March 16, 2005 disposition due date for the certification.

The appellant argues that the above actions were motivated by the political associations of certain eligibles on the PM3536B eligible list and were taken to retaliate against him for his prior participation in litigation filed against the City and the Police Chief and his opposition to the City's request to extend the PM3536B eligible list in early 2004. To support his assertions, the appellant submits sworn affidavits from two individuals who confirm that State Senator Bernard Kenny<sup>4</sup> "intervened and contacted the DOP at the behest of the Chief of Police." Further, the appellant submits a copy of a complaint filed in the Superior Court, Law Division by Daniel LoBue, III, and William J. Brennan, in which similar allegations are made regarding the appointments from the Police Captain (PM3536B) eligible list. The appellant represents that the Superior Court recently denied the City's motion to dismiss this lawsuit, and it "strongly suggested" that the City had committed some wrongdoing in effectuating the promotions at issue.<sup>5</sup> As a remedy, the appellant requests, among other things, that the appointments of McGurk, Romano, Edgar, Mecka and Ferrante be declared void, and he requests that he be immediately appointed to the title of Police Captain with a retroactive date of appointment of March 10, 2005.

In response, the City, represented by Sean D. Dias, Esq., argues that all appointments from the December 16, 2004 certification were appropriate and made in compliance with applicable laws and regulations. With regard to the March 10, 2005 appointments of McGurk and Romano, the City contends that, while these two appointments exceeded its table of organization at the time, it has since amended its ordinance to increase the maximum number of Police Captains from eight to 10. The City emphasizes that its action to amend its ordinance in August 2005 retroactively ratifies the appointments of McGurk and Romano in March 2005. The City relies on *Brennan v. Township of Teaneck*, Docket No. L-5626-03 (Law Div. July 4, 2004) (*Brennan II*) in support of its arguments. Further, the City stresses that the litigation cited by the appellant, which was filed by LoBue and Brennan in reference to the subject appointments, was *dismissed* upon the City's motion on October 3, 2005, and it submits a transcript of those proceedings. The transcript demonstrates that "[a]s to plaintiff William Brennan, the motion [to dismiss] is granted because he has no standing to challenge Hoboken police promotions."

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<sup>4</sup> It is unclear what, if any, connection Senator Kenny has to any of the principals involved in the instant matter.

<sup>5</sup> However, it is noted that the documentation submitted by the appellant to support this representation relates to a complaint filed by Brian Brereton and James Peck, Jr., against the City of Hoboken.

LoBue's complaint was dismissed due to the failure to exhaust his administrative remedies<sup>6</sup>, with the court noting that "an ultra vires appointment can be cured by a ratifying ordinance" and suggesting that the later ordinance amending the table of organization can be retroactively applied to ratify the subject appointments.

In addition, the City contends that its request to extend the disposition due date for the certification was premised on an unexpected "fiscal crisis." Specifically, the Mayor and City Council were in a longstanding disagreement regarding the appropriate budget to pass, and, on Monday, March 21, 2005, the City Council failed to pass an emergency appropriation, which resulted in a shut-down of the City's non-essential services for a short period of time. The City also submits a letter dated April 1, 2005 from Joseph S. Sherman, Corporation Counsel, to the DOP, which confirms the City's intention to make certain promotions in the Police Department and its anticipation that it will be able to do so upon passage of the municipal budget on April 4, 2005. Thus, the City argues that a legitimate and unanticipated budget crisis prevented it from effectuating the appointments of Edgar, Mecke and Ferrante until April 5, 2005.

## CONCLUSION

*N.J.S.A.* 40A:14-118 provides in pertinent part:

The governing body of any municipality, by ordinance, may create and establish, as an executive and enforcement function of municipal government, a police force, whether as a department or as a division, bureau or other agency thereof, and provide for the maintenance, regulation and control thereof. Any such ordinance shall, in a manner consistent with the form of government adopted by the municipality and with general law, provide for a line of authority relating to the police function and for the adoption and promulgation by the appropriate authority of rules and regulations for the government of the force and for the discipline of its members. The ordinance may provide for the appointment of a chief of police and such members, officers and personnel as shall be deemed necessary, the determination of their terms of office, the fixing of their compensation and the prescription of their powers, functions and duties, all as the governing body shall deem necessary for the effective government of the force.

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<sup>6</sup> LoBue was deemed ineligible for the Police Captain (PM3549F) examination due to his failure to file a timely application. LoBue's appeal of his ineligibility was denied by the Board. *See In the Matter of Daniel LoBue, Police Captain (PM3549F), City of Hoboken* (MSB, decided February 9, 2005). LoBue's request for reconsideration of that decision is currently pending.

In *Reuter v. Borough of Fort Lee*, 167 N.J. 38, 43 (2001), the New Jersey Supreme Court declared “[t]hus, from today forward no appointment may be made to any police department position not created in accordance with N.J.S.A. 40A:14-118.”

There is no dispute in the record that as of the date of issuance of the Certification Number PL042162, the City employed eight Police Captains, the maximum allowed by its ordinance. Upon Tuminardo’s retirement on January 1, 2005, one Police Captain vacancy was created and promptly filled by Fitzsimmons. The appellant does not contest this appointment. However, the appellant contends that the absence of a valid ordinance increasing the number of Police Captains in the City’s Police Department on the date of its request for a certification or the extension of the due date mandates a finding that there were no genuine vacancies at that time. He asserts that *Brennan I*, therefore, requires the Board to declare the March 10, 2005 and April 5, 2005 appointments from this certification a nullity.

With regard to the March 10, 2005 appointments of McGurk and Romano, the Board finds no persuasive reason to disturb these appointments. As noted above, the appellant does not dispute the genuine vacancy created by Tuminardo’s retirement on January 1, 2005. Thus, there was ample reason to issue a *complete* certification to the City on that date upon the City’s request to fill that actual vacancy. In this regard, N.J.S.A. 11A:4-8 and N.J.A.C. 4A:4-4.2(c) provide that an appointing authority shall be entitled to a complete certification, meaning the names of three interested eligibles for the first permanent appointment to be made. Regardless of whether or not the City had created two additional vacant Police Captain positions at that time, it would have been issued a certification containing the next three eligibles on the eligible list in order to fill the vacancy created by Tuminardo’s retirement, and it would have been given until March 16, 2005 to properly dispose of the certification. N.J.A.C. 4A:4-4.9(a)3. Thus, the act of certifying the names of McGurk and Romano did not violate *Brennan I*. Further, the appointments of McGurk and Romano on March 10, 2005, prior to the disposition due date, to newly created Police Captain positions similarly did not implicate the policy set forth in the *Brennan I* decision. Specifically, whether or not these positions existed at the time the certification was issued, the names of McGurk and Romano appropriately appeared on the certification, and the City appropriately considered them for the additional positions. This is especially so, since, as of March 10, 2005, the disposition due date had not passed, and no new eligible list was available from which to make the appointments. *Brennan I* simply does not prohibit the use of an outstanding certification of an eligible list to fill vacancies that are created after the issuance of the certification and before its disposition due date. This conclusion is bolstered by *In the Matter of Police Lieutenant (PM1356W), City of Hoboken* (Commissioner of Personnel, decided December 17, 2002), where the Commissioner of Personnel determined that it was permissible to revive and extend an eligible list to effectuate appointments to newly-created positions.

Moreover, the invalidation of these appointments is not mandated by *Reuter, supra*. The appellant argues that, at the time of the March 10, 2005 appointments, the City already had a full table of organization according to the ordinance in place at the time. The City's ordinance permitted the employment of up to eight Police Captains, and the appointments of McGurk and Romano increased the number of Police Captains employed by the City to 10. However, in *Brennan II*, the court explored the possibility of retroactive ratification of police appointment through the subsequent amendment of a municipality's ordinance establishing its table of organization. In *Brennan II*, Teaneck, a Civil Service jurisdiction, utilized a certified list of eligibles for the title of Police Captain to appoint two individuals to that title on April 1, 2003. As of that date, Teaneck's ordinance did not specify the maximum number of individuals it could employ in the title of Police Captain, and Brennan argued that this deficiency rendered their appointments a nullity. Teaneck subsequently amended its ordinance in September 2003, authorizing the employment of three Police Captains. In determining the effect of this subsequent amendment to achieve *Reuter* compliance, the court noted:

Our courts have demonstrated a permissive attitude regarding the ratification of imperfect actions of governmental actors. When an irregularity in the exercise of a valid power by a governmental agent occurs, justice should allow its reform unless the Constitution or Legislature says differently. '[I]f the difficulty is an irregularity in the exercise of a power the municipality does have and the Legislature has not decreed the consequences of the irregularity, our cases seek a just result.' *405 Monroe Co. v. City of Asbury Park*, 40 N.J. 457, 463 (1963).

Applying that doctrine to the matter at hand, the *Brennan II* court concluded that "retroactive ratification is available to validate the Manager's promotions." The Board finds the court's reasoning in *Brennan II* instructive in the instant matter. Thus, the Board concludes that the subsequent amendment of the City's ordinance in August 2005 served to retroactively ratify the appointments of McGurk and Romano. Accordingly, based on the creation of two new Police Captain positions, the existence of an outstanding and valid certification from which to make appointments, and the subsequent validation of the creation of these two new positions, there is no basis to disturb the permanent appointments of McGurk and Romano. *See also Larry S. Loigman v. Township of Middletown*, Docket No. A-906-02T3 (App. Div. Nov. 7, 2003) (Appellate Division concluded that subsequent adoption of Township ordinance retroactively ratified Police Officer appointments effected in violation of *Reuter*).

The April 5, 2005 appointments of Edgar, Mecka, and Ferrante, however, are of particular concern. Following the March 10, 2005 appointments, the City employed 10 Police Captains. The disposition due date of Certification Number

PL042162 was March 16, 2005. On March 10, 2005, the Mayor of the City implored the DOP to extend the disposition due date, explaining that “budgetary constraints” were delaying his ability to make additional appointments from the certification. In Sherman’s April 1, 2005 correspondence to the DOP, he noted the intention of the City to make promotions in the Police Department “upon passage of the Municipal Budget,” which he anticipated would occur on April 4, 2005. Indeed, following the passage of the budget, Carrier, Cuning and Garcia were promoted from Police Captain to Police Inspector, pending DOP’s review of their duties, and Edgar, Mecka, and Ferrante were promoted to Police Captain to fill the vacancies thereby created. It is evident from the record that the DOP’s extension of the disposition due date at the City’s request was, in this instance, inappropriate, pursuant to *Brennan I*. In this regard, it is settled that pursuant to *Brennan I*, where the filling of vacant positions is contingent upon the receipt of funding, genuine vacancies do not exist until actual receipt of funding. See *In the Matter of Police Officer (S9999B), City of South Amboy* (MSB, decided May 7, 2003). The Board clearly announced in *Brennan I* that requests to extend disposition due dates beyond the expiration date of an eligible list will be granted “only to fill *current* vacancies, that is, genuine vacancies actually existing at the time the request is presented.” This policy is particularly implicated where, as here, the original disposition due date was less than one month before the promulgation of a new eligible list, and the actual funding received and vacancies created just days before the new list’s promulgation. Therefore, if it has not already done so<sup>7</sup>, the City is directed to rescind the conditional appointments of Edgar, Mecka and Ferrante and return them to their former permanent titles.

As to the further remedy sought by the appellant, the Board finds that none is available at this time. Specifically, the Board has upheld the validity of the appointments of Fitzsimmons, McGurk and Romano in the instant matter. In addition to these three Police Captains, the City presently has seven other individuals serving in the title of Police Captain: Carrier, Cuning, Di Monde, Falco, Garcia, Lisa, and Simone.<sup>8</sup> Given that the City’s ordinance authorizes the employment of a maximum of 10 Police Captains, no further appointments are warranted. Nevertheless, the Board takes note of the City’s pending appeal regarding the classification of the positions of Carrier, Cuning and Garcia, in which the City contends that these positions should be classified in the title of Police Inspector. In the event that the City is successful in its pending classification appeal and it elects to fill the vacancies created by the promotions of Carrier,

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<sup>7</sup> Pursuant to HRM’s October 18, 2005 determination regarding the classification of the Police Inspector positions, Carrier, Cuning and Garcia should have been returned to their former permanent titles of Police Captain, thereby displacing the April 5, 2005 Police Captain appointees, Edgar, Mecka and Ferrante. Notwithstanding the pendency of an appeal of that determination, no request for a stay of that determination has been requested by the parties or granted by the Commissioner.

<sup>8</sup> As noted earlier, Carrier, Cuning and Garcia were to be returned to the title of Police Captain via HRM’s October 18, 2005 determination.

Cunning and Garcia, the current eligible list for Police Captain (PM3549F), City of Hoboken, must be utilized to fill those vacancies.

### **ORDER**

Therefore, it is ordered that this appeal be granted in part, and the appointments of Dennis Edgar, Edward Mecka, and Fred Ferrante be rescinded. It is further ordered that the conditional appointments of James Fitzsimmons, Kenneth McGurk and Anthony Romano, Jr., be recorded as regular appointments.

This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum.